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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

NO. 89.

ALTON J. LEMON, ET AL.,
Plaintiffs-Appellants,
v.
DAVID H. KURTZMAN, ET AL.,
Defendants-Appellees,
and
PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor-Defendant-Appellee.

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF OF THE CITY OF PITTSBURGH, AMICUS CURIAE.

RALPH LYNCH, JR.
City-County Building
Pittsburgh, Pa. 15219
Attorney for the City of Pittsburgh, Amicus Curiae

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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INTEREST OF THE AMICUS

Pursuant to a Resolution of its City Council unanimously adopted on August 6, 1970, the City of Pittsburgh respectfully submits the following Amicus Curiae Brief.

The City of Pittsburgh, amicus curiae, is a political subdivision of the Commonwealth of Pennsylvania, whose boundaries are coterminous with the public school district of Pittsburgh. The public and non-public schools of the City educate slightly more than 132,000 elementary and secondary school children, of which approxi-

Interest of the Amicus.

mately 62% are enrolled in the public schools, and the remaining 38% are enrolled in the non-public schools. The overwhelming majority of the non-public schools are church related, Catholic schools.

The City of Pittsburgh is vitally interested in the Pennsylvania Non-Public Elementary and Secondary Education Act of 1968 (hereafter called Act 109) because that legislation bears substantially and beneficially upon the complex of problems and interests which are generally referred to as "the urban crisis". Specifically, Act 109 has advanced the welfare of all of the residents of the City by immediately ameliorating the following aspects of a continuing urban crisis:

a. It enables non-public schools to maintain their level of efforts and secular educational services to the city's non-public school children.

b. It advances the secular educational interests of the city's public school children whose education would undoubtedly suffer if the presently over-strained public school facilities and resources were required to be further spread and diluted in the event the non-public schools were not enabled to maintain their present secular educational efforts, due to lack of public assitsance, such as is provided by Act 109.

c. It ameliorates the prevailing over-burden of local real estate taxpayers, and state wide over-burden of citizen and business taxpayers, who provide the common source of funding for the operation not only of the public schools, but also of the city and state government budgets, which, like the

school district budget, have been continually under severe strain.*

d. It helps to preserve to the city indispensable and currently irreplaceable educational resources, the diversity and cross enrichment of educational experience, and a broad range of social service and community action centers which the non-public schools provide in support of city, state and federal social service programs.

e. It advances the general welfare of the city in additional ways, namely by providing training and skills for city business employments, and providing an institutional focus which tends to hold and stabilize residents' patterns in city neighborhoods which are so essential to stem the fiscally and socially harmful trends of flight to the suburbs by middle class citizens, taxpayers and workers.

In the face of the great financial crisis facing all educational systems and all levels of government, the city deems it in the clear public interest for government to provide assistance to the secular educational efforts of non-public schools, in the manner achieved by Act 109. The city believes that Act 109 is constitutional, as found by the court below, and is indispensable to the welfare of urban and metropolitan centers, such as Pittsburgh.

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*The annual budget of the Pittsburgh School District ($74 million) is almost three-fourths the size of the annual budget for the government of the City of Pittsburgh ($104 million). The budgetary strain of the school district was evidenced by a systemwide teachers' strike in the public schools during the school year 1966-67.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

Of the numerous questions raised by the Appellants herein, only one appears to be substantial, namely, whether on its face and by its terms, Act 109 violates the Establishment Clause of the federal constitution. The other questions raised by the appeal are, we believe, patently insubstantial. The Appellants' plea of the necessity of a trial is untenable and inconsistent with their insistence in the court below that their action seeks to nullify the entire operation of Act 109, and represents an attack on the entire statutory scheme. Not being limited to any given practice or application to any specified school or schools, the action raises a flat question of constitutional law. Accordingly, this Brief is addressed solely to the issue whether Act 109, as it embraces all non-public schools, including church related chools, is constitutional under the Etablishment Clause.

ARGUMENT

I. The Controlling Test of Constitutionality Is Whether Act 109 Serves A Secular Legislative Purpose and A Primary Effect That Neither Advances Nor Inhibits Religion.

Within the past decade, this court, on three separate occasions, repeated the specific formula to be applied in testing the constitutionality of legislation under the Establishment Clause. See *Abington School District v. Schempp,* 374 U.S. 203 (1963); *Board of Education v. Allen,* 392 U.S. 236 (1968); *Walz v. Tax Commission,* 397 U.S. 664, (1970). While each of the cited cases involved distinguishable facts and relationships, each case made clear that, building upon past authority, the test for governing challenges under the Establishment Clause was that first announced in the *Schempp* case:

> "That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion." 374 U.S. at 222.

The universality of the foregoing test is evidenced from its application to the issue of public school bible-reading in *Schempp,* to state provision of secular textbooks to parochial school children in *Allen,* and to tax exemption of houses of worship in *Walz.* In protecting the constitutional ideal of government neutrality toward religion, the quoted test was held in the *Allen* case to permit state assistance to the secular functions of church related elementary and secondary schools. Similarly, in *Walz,* the secular purposes and effects of tax exemptions to houses of worship were found to render tax exemptions

constitutional. It is thus clear from these decisions that the secular nature of aid, and not the fact of church relationship, is the controlling factor in determining constitutionality of government action. The actual decisions of this court thus belie attempts to avoid the central meaning of the constitutional test by recasting that test in terms of hypothetical or possible dangers that could inhere in government relationships with the church related service institutions. If therefore, Act 109, on its face, serves a secular legislative purpose and has a primary effect of aiding secular educational goals, it cannot be said to advance or inhibit religion or to violate the Establishment Clause as a matter of law.

II. The Purpose and Primary Effect of Act 109 Is Secular — and Not An Aid to Religion.

A. *The legislative purpose of advancing secular education.* By its very terms, Act 109 is manifestly secular in purpose. The title to the Act, its provisions on legislative findings and declaration of policy, its provisions on limitation of subjects covered, and its conditions of teacher certification, preference and testing, clearly point to, and confine the statutory operation to, the advancement of the secular education of children in non-public schools. This Act has now been in operation for two full years without any notable expression of dissatisfaction either by the governmental or educational agencies at the local or state levels. There is no basis whatsoever, either in the terms of the law, or in observable operation of the Act to justify Appellants' self-serving denial of the secular legislative purpose of this Act.

The legitimate interest of the state legislature to advance the secular education of children in non-public

and church-related schools, and the public interest in such legislation has been repeatedly expressed in numerous federal and state educational welfare statutes. Those interests were specifically acknowledged in *Board of Education v. Allen, supra.,* as well as in earlier decisions of this Court. See *Everson v. Board of Education* 330 U.S. 1 (1947); *Cochran v. Louisiana State Board of Education,* 281 U.S. 370 (1930). As stated in *Pierce v. Society of Sisters,* 268 U.S. at 510 (1925);

> ". . .if the state must satisfy its interests in secular education, through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

Later this Court declared the primacy of public interest in education:

> "[Education] is the very foundation of good citizenship . . . in these days, it is doubtful that any child can reasonably be expected to succeed in life if he is denied the opportunity of an education." See *Brown v. Board of Education,* 347 U.S. 483 (1954).

Most recently, this Court in *Waltz v. Tax Commission, supra.,* cited the holding of the *Allen* case that state assistance to the secular educational functions and goals of church-related schools meet the purpose, as well as effect test of non-establishment of religion.

B. *The Primary Effect of Act 109 is to improve the Secular Education of Children in Non-Public Schools and also of the Children in Public Schools*

Act 109 reimburses schools for instruction services and books in four secular subjects, namely mathematics,

foreign language, physical science and physical education. Ever since the passage of the National Defense Education Act, 20 U.S.C. 445, the expansion of a technological economy and the shrinking of distances between nations of peoples with different languages, the first three aided subjects have commanded the most urgent attention of government and educators. These subjects, along with that of physical education, are so clearly secular in their content and impact, that it is difficult to imagine how the appellants arrive at their conclusion that aiding those subjects advances religion or the religious function of a non-public school. A whole host of federal education aid laws and programs are directed specifically to the problems of science education and language education. Hence, to argue that such legislation is an establishment of religion, contradicts the entire national as well as state experience.

The subjects aided by Act 109 fall within the requirements of the compulsory education laws of Pennsylvania, to which the non-public and church-related schools are subject. In addition to these laws, controls are also imposed by Act 109 to insure a satisfactory and primary secular result, e.g. teacher certification, performance requirements, and testing of the students receiving the aided educational services. Thus, on its face, this statutory scheme insures a secular primary effect and indeed prohibits any such effect in aid of religion. See 24 Pa. Stat. Ann. §5603(3). A second, equally important, secular effect of Act 109 is the preservation of educational resources that are indispensable to the welfare of the entire school community. By enabling non-public schools to continue operations in the face of mounting fiscal crises, Act 109 forestalls the catastrophic conse-

quences of wholesale, non-public school closings. Both the likelihood of such closings without public assistance, and the chaotic results that would follow therefrom were acknowledged in the provisions of Act 109, and also by President Nixon in his Education Message to Congress, March 3, 1970, H.R. Document, No. 91-341, 91st Cong., 2d Sess.

The plight of the City of Pittsburgh provides a stark illustration of the realities of non-public education and its involvement in the secular educational enterprise of all citizens.

Due largely to volunteered and contributed professional and paraprofessional services, through church contributions, and to parental payment of annual tuition and fee charges ranging from $170 in elementary grades to $200 to $350 in secondary grades, the predominant non-public (Catholic) school system in Pittsburgh has been able to educate some 36,000 students at an approximate average per-pupil cost of $215.00 per year, as against the public school average per-pupil cost of $878.00 per year. Were the full cost of educating these non-public school students visited upon the city's public schools, indescribable harm would be visited upon the fiscal stability of the city government as well as the school district, and only the harshest tax consequences to the entire citizenry and economy of the city could ensue. See, *Rhoades v. Abington Township School District*, 424 Pa. 202, 210 (1967).

What is worse, even if the fiscal resources could be made available to assume the secular educational burden now borne by non-public schools, the education of citizens of Pittsburgh would be set back irretrievably

for many years. In terms of sheer physical space, the school district now lacks the capacity to accommodate its own students, no less absorb massive additional enrollments. The district is presently required to use 62 portable schools for its students, and was required to abandon a crash building program in recent years due to lack of funding sources. The overwhelming number of public schools are in dire need of replacement, having been built prior to 1930 so that the present building priority is to replace decrepit facilities, rather than adding sorely needed additional schools.

In view of the foregoing, it is clear that there is no viable or reasonable alternative for promoting sound secular education for public as well as non-public students, to the measures taken by Act 109 and that the undenyable effect of Act 109 is to advance the secular educational opportunities of all elementary and secondary school students, in all schools, by maintaining the educational potential and output of non-public schools which meet state educational standards.

With regard to Appellants' argument that Act 109 creates constitutionally impermissible involvements of government and religion, Appellants rely primarily upon abstract generalizations and a set of hypothetical horrors that are not supported by the terms of Act 109. As this court noted in *Walz,* many government-religion relationships are unavoidable if both are to remain free to serve society in areas of common interest. The continuity and detail of such relationships are not constitutionally conclusive. Rather the critical point is the primary effect of any such relationship. The degree and quality of the relationships created by Act 109 reflect long established similar relationships of a much greater

order between the states and church-related schools under the compulsory education laws and regulations. It is clear that such relationships are not unconstitutional, for otherwise this Court could not have decided, as it did in *Pierce v. Society of Sisters,* 268 P.S. 510 (1925), that parents and non-public schools may constitutionally educate children in compliance with state education laws; and inferentially that the continuous and detailed state supervision of church-related schools would not be a constitutional barrier to the exercise of the protected rights to freedom of choice in education.

By comparison with the voluminous forms of relationship and regulation between the state and church-related school, the few additional regulations created by Act 109 are microscopically de minimis, and could no more be unconstitutionally "excessive" than the compulsory education laws and regulations of all states, not to mention the great number of federal laws and regulations affecting such schools.

The appellants' abstract "entanglement" argument is also out of joint with our entire social development. As this Court has repeatedly recognized, the expansion of government in a compressing metropolitan society leaves no citizen or institution untouched or uninvolved by pervasive government supervision and regulation. To out-law church-related schools from such contacts would effectively place them beyond the ken and reach of necessary government involvement, and destroy their ability to survive, along with other non-profit institutions an charities, in an environment that is, of necessity, shot through with government relationships and involvements. Thus the Appellants' entanglement argument, advanced in the name of neutrality, is far from

neutral, but clearly hostile to the opportunities and rights of non-public school children and their parents.

Appellants' reference to the "purchase of services" method of administering Act 109 as a cover for unconstitutional action between church and state, will not stand scrutiny. A great bulk of Pennsylvania's entire welfare administration rests upon its traditional pattern of purchase of services. The pattern is by no means confined to the state of Pennsylvania. It is the same pattern employed by the Federal Elementary and Secondary Education Act, (20 U.S.C. 883 (b)). As most recently amended, that Act provides:

> "1. General Authority.
>
> Delegation of Authority; Utilization of other Agencies
>
> Section 411. (a) ***
>
> b. In administering any applicable program, the commissioner is authorized to utilize the services and facilities of any agency of the Federal Government and of any other public or non-profit agency or institution in accordance with appropriate agreements, and to pay for such services either in advance or by way of reimbursement, as may be agreed upon." See Conference Report, March 24, 1970 on Elementary and Secondary Education Amendment of 1969, H.R. Report No. 91-937, 91st Cong., 2nd Session, P. 50.

The absurdity of the Appellants' entanglement argument is thus revealed in the extermity of its implications which would outlaw not only Act 109, but, a fortiori, the federal education aid laws and the host of state

welfare laws. Such a destructive view of the Establishment Clause, both of the social welfare and of the liberty of church-related institutions and their supporters, is not entitled to serious consideration.

The Appellants' argument on church-state involvement, rhetorically described as "entanglement", also suffers from an inner inconsistence. They would appear to have the law work in two contradictory ways, but always against the interests of church-related education. First, they recognize that non-public schools serve a public function, meet the public interest in secular education, and are therefore properly subject to state supervision and regulation of their secular educational programs. Nevetheless, they would deny that these same schools perform secular educational functions as to qualify for state assistance. Thus, church-related schools which are recognized as qualified schools under general educational law, become, in Appellants' view, religious institutions under constitutional law, and not schools for secular education, as well as religious instruction. The construction of this strange legal antithesis by generalizations about "entanglement" of church and state cannot be given balance by the mere fact that state financial assistance is rendered to advance secular education, for the degree and nature of "entanglement" between state involvement to insure proper secular education without assistance, and similar involvement for similar purposes with assistance, are distinctions without constitutional differences.

CONCLUSION

The City of Pittsburgh believes that Act 109 is constitutional on its face with respect to all non-public schools, including church-related schools, in that it advances an unquestionably secular legislative purpose and has a clear primary effect that neither advances nor inhibits religion. As to this conclusion, and all other conclusions reached by the court below, the City believes and requests that the judgment below should be affirmed.

Respectfully submitted,

RALPH LYNCH, JR., ESQUIRE
City Solicitor
City of Pittsburgh
313 City County Building
Pittsburgh, Pa. 15219
Attorney for the City of
Pittsburgh, Amicus Curiae

RESOLUTION

WHEREAS, the Council of the City of Pittsburgh deems it in the best interests of the City that it support the position of the granting of aid to private schools;

NOW, THEREFORE, BE IT RESOLVED, That the City Solicitor, on behalf of the City of Pittsburgh, is hereby directed to file an amicus curiae brief in the case of *Lemon et al v. Kurtzman et al,* No. 1189* October Term, 1969,* Supreme Court of the United States, in support of the position of aid to private schools.

In Council August 6, 1970, read and finally passed.

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* (as written)